1954

Austin F. Winchester v. Egan Farm Service, Inc. : Brief of Appellant

Utah Supreme Court

Glen E. Fuller; Joseph Y. Larsen, Jr.; Attorneys for Plaintiff-Appellant;

In the Supreme Court
of the State of Utah

AUSTIN F. WINCHESTER,
Plaintiff-Appellant,

—vs.—

EGAN FARM SERVICE, INC.
Defendant-Respondent.

No. 8219

APPELLANT'S BRIEF

GLEN E. FULLER and
JOSEPH Y. LARSEN, JR.
Attorneys for Plaintiff-Appellant
32 Exchange Place
Salt Lake City, Utah

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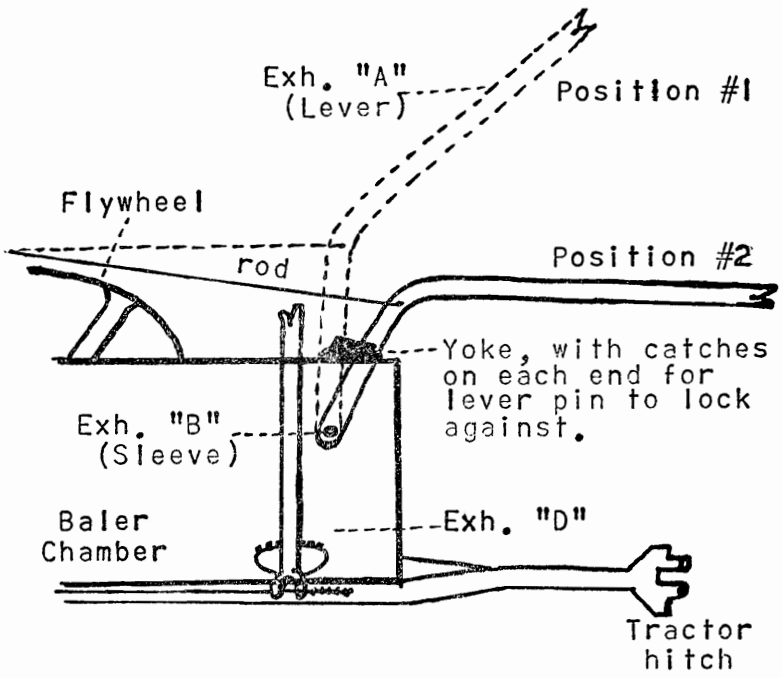
TEXTS

FRONT END OF BALER
(Lever Assembly shown)



Note: Bolt and burr (Exh. "C") are inserted through Exh. "B" (sleeve) and through side of baler, anchoring sleeve to baler. Washers are placed next to burr. Washers are larger than sleeve, thereby allowing Exh. "A" (lever) to rotate freely over the bushing without coming off.

(See Exh. "I", Owner's Manual, for more complete picture of baler without lever assembly.)

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FACTS OF THE CASE

The appellant, Austin F. Winchester, hereinafter referred to as the plaintiff, lives at Mountain Green, Morgan County, Utah. He operates a farm and does considerable amounts of custom farm work or neighbors and customers in Weber, Davis and Morgan Counties. This work primarily consists of combining grain, land moving and leveling, and hay baling.

The respondent, Egan Farm Service, Inc., hereinafter referred to as the defendant, is a retail sales organization located at Ogden, Utah. It sells, services and assembles farm equipment.

On or about September 18, 1951, plaintiff purchased a new "Long 50" baler from the defendant, who delivered the same to plaintiff's farm at Mountain Green. The baler was manufactured by Long Manufacturing Company of Tarboro, North Carolina. Upon receiving the baler at its place of business at Ogden, Egan Farm Service attached a lever assembly mechanism to the front part of the baler. (Tr. 4) This lever mechanism extends forward from the front of the baler so that the baler operator, who sits on a tractor to which the baler is hitched, can manually put the baler in or out of operation by adjusting the position of the lever. It reaches from the front of the baler to the right side of the operator as he sits on the tractor, the end of the lever being about even with, and about nine inches to the right of, the operator's hip. (Tr. 83)

To illustrate the principals involved in this appeal and to more clearly inform the Court of the operation of the lever mechanism, a diagram is found at page 3. The diagram generally illustrates the lever mechanism in operating and non-operating positions.

Attached to the lever mechanism is a rod which extends farther back to other parts of the hay baler. When the lever is placed in upright position No. 1, it pushes against the rod, causing the rod to press an idler pulley against the belt drive of the baler. This causes the baler to engage and operate. On the other hand, when the lever is pulled downward into position No. 2, it pulls on the rod, thus disengaging the idler pulley from the belt and causing the baler to cease operating. The baler motor still runs, however. On pulling the lever

into down position, tension in created upon the lever by a spring attached to the idler pulley. This spring is about one inch in diameter. During the operation of the baler the lever is in an upward position 90 per cent or more of the time (Tr. 100); it is only when the baler operation is disengaged, with the motor running, that the lever is in the down position.

After purchasing the baler in the fall of 1951, plaintiff baled approximately 1,000 bales of custom hay and about 300 bales of his own hay—about two days of operation doing the loose ends of the summer harvest—and then put the baler in a shed for the winter. (Tr. 39) On or about May 25, 1952, he took the machine from the shed and took it to an area at the mouth of Weber Canyon for the purpose of baling hay for customers. He baled hay for about two weeks prior to June 16, 1952, at which time he suffered the injuries giving rise to the lawsuit.

On June 16, 1952, while operating the baler in a field on a farm at South Weber, Davis County, plaintiff completed baling one piece of hay and took the baler from that field to another. Upon completion the first field of hay, he left the motor running and disengaged the operation of the baler by putting the lever in the down position. Upon arriving at the second piece of hay, and after putting the machine in position to bale and stopping his tractor, he turned to his right on the tractor seat for the purpose of releasing the lever from the down position and placing it in the upright position so that he could commence baling. (Tr. 31-32) Before he could place his hand on the lever, it suddenly disengaged, and the extremity thereof struck him across the nose and eye. (Tr. 32) As a result, he suffered a broken nose and laceration and other injuries of the right eye. His permanent injuries con-

sist of a greatly enlarged pupil in his right eye which refuses to expand or contract with variations of light intensity, necessitating the constant use of dark glasses. He also suffers general disfigurement from his broken nose and unsightly disfigurement of his right eye. He sustained financial losses arising from doctor care, hospitalization, drugs, medicine, transportation seeking treatment, and loss of earnings during the time when he was unable to return to work.

In the short time he had operated the baler the lever mechanism had never before disengaged without manual assistance, and, to his knowledge, it had never so disengaged during the time prior to his injury that three other persons had operated the baler for short intervals. (Tr. 34)

Plaintiff commenced an action against the defendant, and joined Long Manufacturing Company and Dearborn Motors Corporation, the successor in interest of Long Manufacturing Company. Being unable to secure personal jurisdiction over the other two defendants, plaintiff proceeded against Egan Farm Service, alleging as to the lever mechanism, that it was "negligently and carelessly attached to the . . . baler, . . . and contained attachment parts which were weak, defective and insufficient in size and strength . . ." (R. 001). Most of the other allegations concerning the nature of the baler and its defects were inapplicable to the defendant.

At the trial, plaintiff contended that the base of the lever, at the point where it was attached to the baler chamber by means of a bushing (Exhibit "B") and a bolt, burr and washer (Exhibit "C"), actually did not in fact contain a bushing. Furthermore, plaintiff contended that defendant inserted a 5/16 inch bolt (Exhibit "E") through the bushing area instead of the 3/8 inch bolt which was required for proper

assembling. He contended that the failure to use a bushing and the insertion of the smaller bolt permitted the lever mechanism to slide upward sufficiently so as to allow the lever pin to slip past the catch which was anchored to the baler, thereby causing the lever to fly loose, inflicting the injuries complained of.

After plaintiff put on his case and rested, defendant moved the Court for a dismissal and a directed verdict upon three separate grounds. The grounds generally asserted were those of (1) failing to establish negligence, (2) contributory negligence and (3) assumption of risk. After argument upon the matter, the Court granted the motion and directed a verdict against plaintiff. Although the court did not particularize in writing, it felt that plaintiff's case failed for the reason that he had assumed the risk of the defect which caused the injury complained of. The court subsequently denied plaintiff's motion for a new trial.

STATEMENT OF POINTS TO BE RELIED UPON BY PLAINTIFF ON APPEAL

POINT 1. The court erred in dismissing the action and in granting a directed verdict in favor of defendant at the conclusion of plaintiff's case.

(A) The evidence tended to prove negligence on the part of the defendant in assembling the baler.

(B) The uncontradicted evidence introduced in behalf of plaintiff did not prove that the accident was caused, as a matter of law, by reason of his sole negligence; nor did the same prove, as a matter of law, that he was guilty of contributory negligence proximately causing his injuries.

(C) The uncontradicted evidence introduced in behalf of plaintiff did not prove, as a matter of law, that he assumed the particular risk from which his injuries occurred.

ARGUMENT

(A)

The evidence tended to prove negligence on the part of the defendant in assembling the baler.

Although plaintiff, in its motion for dismissal and a directed verdict, assigned the foregoing point as one of its grounds, the Court was not concerned with its position. Nevertheless, since the written record is silent, plaintiff will point out sufficient evidentiary facts justifying submission of the case to the jury from the standpoint of establishing causation and proving negligence on the part of the defendant in assembling the baler.

The testimony of Merlin Egan, president of the defendant, established the fact that a 3/8 inch bolt was required for properly assembling the lever mechanism to the baler chamber (Tr. 5). The bolt was inserted through the sleeve (Exhibit "B") so as to anchor the sleeve tightly to the baler when constructed as required (Tr. 10). Before the bolt was burred against the sleeve, the end of the lever was placed over it and washers larger in size than the sleeve were inserted against the sleeve, thus allowing the lever to rotate freely without coming off.

Plaintiff contended that the lever mechanism was defectively assembled in two respects, both or either of which

could have caused the lever to uncatch and strike him as indicated.

(1) Defendant did not install the required bushing; and

(2) An undersized bolt of improper length was used to anchor the sleeve to the baler.

Further testifying under Rule 43 (b), U.R.C.P., Merlin Egan admitted that if a 3/8 inch bolt was put through a half-inch sleeve (spacer) (Exhibit "B"), such as was being used for illustrative purposes—and which actually was removed from an identical baler belonging to Leslie Olsen at Eden, Utah (Tr. 22)—the assembly "wouldn't be right" (Tr. 12). It logically follows from Mr. Egan's testimony that the defendant would be negligent in attaching the lever mechanism with an undersized bolt or without a sleeve (also referred to during the trial as a "bushing" or "spacer").

Plaintiff took the stand and testified that the lever pin (Tr. 48) fit into the anchor-plate catch 3/8 of an inch deep; he further testified that he observed up and down play in the lever mechanism, amounting to possibly 3/8 of an inch free travel (Tr. 49). This discovery, made when he examined the lever after being released from the hospital, caused him to disassemble the lever mechanism. The existence of free play would allow the lever to raise and slip out of the anchor-plate catch, particularly since the lever was subjected to considerable pulling tension on the part of a large spring (Tr. 48, 49). In fact, plaintiff submits that it would not necessarily be vital that the exact amount of free play be proven for the simple reason that any amount of play in the assembly could allow

for a gradual wearing against the anchor-plate catch, the net result being that the abnormal wear would eventually permit the lever pin to slip past its catch. This is a logical conclusion to be taken in view of the testimony of Merlin Egan, supra, and from the common experience of mankind.

Plaintiff submits that, as the trial would have progressed in its logical order, he would have brought out evidence that Egan Farm Service, Inc., improperly assembled the lever mechanism on nearly every long "50" baler which it sold and assembled to the minimum point of showing that 3/8 inch bolts were inserted into 1/2 inch bushings (Tr. 12, 22, 24); and that this defect could have been remedied by drilling the baler chamber to 1/2 inch in size and inserting a 1/2 inch bolt.

Of course, plaintiff contends that his baler was much more carelessly assembled than just indicated. Plaintiff introduced the bolt which he took from his baler after the accident (Exhibit "E"—Tr. 45), and further testified that no bushing was present. The bolt was 5/16 inch in size, smaller than the 3/8 inch bolt which defendant believed and stated to be the required size.

Plaintiff refers to the recent Utah cases of Hooper v. General Motors Corp. (Utah, 1953), 260 P2 549, and Northern v. General Motors Corp. (Utah, 1954), 268 P2 981. In Hooper v. General Motors Corp., a suit against the assembler of a truck for damages sustained when a recently purchased truck overturned allegedly because the left rear wheel failed due to separation of its component parts, held, in reversing a directed verdict in favor of defendant that:

> " . . . the assembler of an automobile, who purchases wheels from a manufacturer, is liable to one who purchases a car from a retailer for an injury caused by the collapse of a wheel because of defects which would have been discoverable by reasonable testing or inspection. McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N. E. 1050, L. R. A. 1916F 696."

It is submitted that the defendant could easily have seen and detected the defects complained of in this lawsuit for the reason that it assembled that particular part of the baler.

Further continuing with the rules laid down in the Hooper case with respect to the sufficiency of the evidence to go to the jury, the Court stated:

> "Contrary to the instruction as given, the undisputed fact of post accident rim-spider separation may be (1) some evidence of a defective wheel at the time of automobile assembly and, (2) some evidence of accident causation."

The Court pointed out that the separated condition of the spider and rim of the wheel after the accident was some evidence of a defective assembly. The further fact that the car had only gone 6,700 miles with no prior damage (cf: this baler used but slightly more than two weeks) was a significant factor in the Court's reversal.

The reasoning and the rules laid down in the Hooper v. General Motors Corp. case were cited with approval in the Northern v. General Motors Corp. case. Suffice it to say that both cases are strong authorities for plaintiff's position in this action and, because of their recent nature, the writer feels that the Court is not in need of extensive argument as to their effect and meaning.

Plaintiff submits that defendant's negligence and the question of causation were sufficiently established to present a jury question.

(B)

The uncontradicted evidence introduced in behalf of plaintiff did not prove that the accident was caused, as a matter of law, by reason of his sole negligence; nor did the same prove, as a matter of law, that he was guilty of contributory negligence proximately causing his injuries.

If the Court agrees that there was sufficient evidence to go to the jury on the question of causation, the first of the points just raised: namely, that of sole negligence, has been sufficiently answered. Consequently, this discussion will concern itself solely with the question of whether plaintiff was contributorily negligent in sustaining the injuries complained of.

Although defendant raised the matters of contributory negligence and assumption of risk in its motion for dismissal and for directed verdict, there is very little distinction between the two defenses in most cases. In fact, the Restatement of Torts has combined the two into one defense. However, since the points were separately raised, this discussion will be divided into two parts, each part referring primarily to its particular heading.

Prosser on Torts, Chapter 9 at page 379, points out the main distinction between the defenses of contributory negligence and assumption of risk:

> " . . . In working out the distinction, the courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the danger and intelligent acquiesence in it, and that to the extent that this can be found recovery will be denied; while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct however unwilling or protesting the plaintiff may be. The two may co-exist, or either may exist without the other."

This discussion of contributory negligence will primarily relate to what constitutes reasonable conduct under the circumstances of this case.

The precise question before this Court on the issue of contributory negligence is whether plaintiff, in reaching for the lever and in getting the side of his face in such a position that it received a glancing blow from the lever, was guilty of such unreasonable conduct under the circumstances that no jury question was presented. Defendant will undoubtedly maintain that plaintiff knew the lever was subject to considerable tension created by the spring, and that he knew that if the lever became disengaged, he would possibly sustain injury if he was in a position to be struck by it.

In answer to such an argument—which seemed to impress the trial judge—the writer wishes to point out that most levers are subject to spring tension of one type or other. In fact, if there were no tension against levers, there would be nothing to cause their locking devices to stay in place and no purpose for their existence. These are merely elementary rules of mechanical engineering and physics.

We must next ask ourselves if plaintiff's conduct was unreasonable, considering all possible inferences in his favor,

in turning to his right to grab the lever and in getting his face into a position where it might be struck. Such might be the case if plaintiff had reason to believe that the lever might fly loose, but we must consider that the baler and lever mechanism were constructed so that the lever would reach forward to the tractor operator. From his position on the tractor the lever was always available for use (see diagram). Furthermore, the Owner's Manual (Exhibit "I", p. 2) clearly stated that the baler "has been soundly engineered and thoroughly tested to give you the best automatic pick-up hay baler that you can buy." Consequently, we face the fact that it was intended that the lever be in a position near the body of the operator and that it should not constitute a booby-trap.

Plaintiff's evidence was that the operator of a baler is required to turn to his right for the purpose of reaching for the lever and for watching the pick-up assembly and other parts of the baler as the hay feeds into the baler during its operation (Tr. 87, 103). The operator of a hay baler never looks straight ahead of the tractor while baling; he must always look ahead out of the corner of his left eye, so to speak, and watch the baler pick-up (and other parts of the baler) as it follows the windrow with his right eye, with his face and body turned slightly to the right. The net result is that one's body and face are in position above the lever when in the downward position.

Of course, the lever would be in an upward position during operation, but its location and the operator's habit of turning to the right upon stopping so as to view the baler or to grab the lever when in the down position could certainly

be anticipated by the manufacturer as a normal course of conduct. In fact, the writer has operated farm machinery all of his life and has encountered levers on every type of machine. True, they are designed to hold tension, but they are widely regarded as harmless items. Furthermore, many farm machines other than balers have levers located in close proximity to the operator's body. That is where they have to be.

Mere knowledge that a lever is subjected to spring tension surely cannot charge plaintiff with contributory negligence when a defect in assembly released the tension. Nevertheless, even assuming plaintiff's standard of care fell below that of a reasonable man as to the "spring tension" risk, he is not barred from recovering since he was not negligent as to the "defective assembly" risk caused by "free-play" in the lever assembly. Prosser on Torts at page 393, in commenting on this proposition from a contributory negligence standpoint, says:

> "Such conduct will bar recovery only if it has exposed the plaintiff to the *particular risk* from which he suffers harm." (Italics added.)

Further quoting from page 396:

> "The accepted view now is that the plaintiff's failure to exercise reasonable care for his own safety does not bar his recovery unless his injury results from the risk to which his conduct has exposed him. In a leading Connecticut case, in which a workman violated instructions not to work on the unguarded end of a slippery platform and was injured by the fall of a brick wall, it was held that he might recover, since his negligence did not extend to such a risk."

Plaintiff submits that the defects in assembly caused and

permitted the tension to pull the lever pin out of its catch, thus releasing it with great force.

Quoting from 38 Am. Jur., Negligence, Par. 177, page 853, the rule is further explained:

> " . . . Therefore, there can be no contributory negligence unless the defendant is guilty of negligence having a direct and proximate causal relation to the injury. This observation is important, especially from the standpoint of the burden of proof, and in the direction of a verdict for failure to sustain the burden of proof."

Quoting further from the same source at Par. 182, page 859:

> "Exposure of known danger, however, is not always contributory negligence. It constitutes contributory negligence only where it is voluntary and unnecessary exposure to a dangerous instrumentality or condition, the peril of which is appreciated by the plaintiff. Even the most prudent man is sometimes compelled to take risks; at least some risk is apparent in the ordinary activities of life . . . Men may properly and lawfully do work that is essentially dangerous in its nature, and a person engaged in the performance of such work may know that it is dangerous, and yet not be guilty of contributory negligence in the performance thereof, unless he voluntarily and unnecessarily exposes himself to the danger."

And from Par. 184 at page 861:

> "An essential element of contributory negligence is that the person to be charged therewith knew, or by the exercise of ordinary care should have known, of the circumstances or condition out of which the danger arose."

Also from Par. 190 at pages 866, 868:

> "Contributory negligence is not imputable to a plaintiff for failing to look out for a danger for which he had no reasonable cause to apprehend, . . . One without special knowledge of all the elements of danger incident to a particular situation is not to be charged with contributory negligence if he exercised reasonable care so far as things appear to him . . . "

The Restatement of Torts cites two examples at Section 468 to illustrate the rules just set forth:

> "I. The X Company uses a public alley as a place in which to load and unload its trucks. The company warns A that the alley is dangerous and orders him to keep out. Notwithstanding this warning, A enters the alley. A siding maintained by the company ends on a bank immediately above the alley. Due to the defective condition of the siding a coal car is precipated into the alley striking A. A is not barred from recovery by his consciously subjecting himself to the risk of being run down by the company's trucks.
>
> 2. A while working as a mason in the repair of B's wall is warned by his foreman not to use a certain scaffold because there is no guard rail about it. While so working on the scaffold, a part of the wall, which through the negligence of B is in bad repair, falls. It strikes A and injures him. A is not barred from recovery against B although he might be barred had his injury resulted solely from his falling from the scaffold."

The defendant might come back and try to avoid the general rule by saying that no injury would have been caused by the defective assembly were it not for the action of the spring tension of which plaintiff was aware. Again Prosser on Torts at page 397 provides the answer:

> " . . . Such cases frequently say that the plaintiff's negligence is not the 'proximate cause' of his damage. It is, of course, quite possible that his conduct may not have been a substantial contributing factor at all, where the harm would have occurred even if he had exercised proper care. But in the usual case the casual connection is clear and beyond dispute, and no problem of causation is involved. What is meant is that the plaintiff's conduct has not exposed him to any foreseeable risk of the particular injury through the defendant's negligence, and therefore is not available as a defense."

In the Utah case of Glenn v. Gibbons and Reed Co. (1954), 265 P2 1013, plaintiff secured a jury verdict for damages to a large shovel which was being used to load gravel in a gravel pit. During the course of operations a large bank of gravel broke loose and descended upon the shovel, causing it to be damaged. The defendant raised the defense that plaintiff was contributorily negligent and, after the jury verdict, a motion for directed verdict was granted against plaintiff. In reversing the trial court's decision and in reinstating the jury verdict, the Utah Supreme Court made the following observation:

> "The third basis for the motion for the directed verdict was that plaintiff was contributorily negligent as a matter of law. When the plaintiff viewed the pit, he became alarmed that his shovel was in a position of danger and when the operator refused to remove the shovel without direction from Newman, plaintiff did nothing further to extricate his property from the peril. Apparently defendant contends that plaintiff was under a duty to seize the shovel which was then under the control of his bailee, and drive it out of the pit himself. *Plaintiff had no knowledge of the probable presence of water and wet clay at the base of the gravel*

and no knowledge of blasting to be performed that night; his protest was based simply on the height of the face. *Had he known all of the facts, he may have been held to a higher degree of care.* Knox v. Snow, (Utah) 229 P2 874. *Too, more than one inference can be here drawn as to what a reasonably prudent man would do under the particular circumstances, which makes the question of contributory negligence one for the jury.* Baker v. Decker, 117 Utah 15, 212 P2 679." (Italics added.)

Plaintiff submits that the foregoing case is entirely in point with the case now before the Court. In that case, plaintiff realized that there was a potential danger from the face of the gravel pit, but did not realize or understand that there was the presence of water and wet clay at the gravel or that there would be blasting performed that night; similarly, this plaintiff knew that there was spring tension on the lever, but he also knew that such levers would stay in place. What he did not know was that there was a defective assembly which would allow the spring tension to release. Had plaintiff known all of the facts, he certainly would have been held to a higher degree of care than was exercised. Consequently, he should not be charged with contributory negligence.

The case of Glenn v. Gibbons and Reed Co. refers to another interesting point which will undoubtedly be raised by defendant. In the foregoing quotation, it was pointed out that plaintiff became alarmed "that his shovel was in a position of danger . . . " In this case, defendant will undoubtedly refer to plaintiff's testimony (Tr. 57) that the lever did not appear to be working properly. However, plaintiff further testified (Tr. 50, 63, 68) that there was nothing about the lever which

caused him to fear it. He stated that he did not like the position of the lever and that it showed evidence of a poor design and that it was generally unhandy and in the way (Tr. 68). He further testified that in the upright position (Tr. 95) the lever did not operate properly in that it did not cause sufficient tension to be applied against the belt pulley, thus allowing the belt to slip off occasionally. However, the lever itself had never before slipped out of its catch in either the upright or in the down position. In any event, the Court should not lose sight of the fact that an entirely different set of mechanical principles took effect upon the lever and the source of its tension while in the upright position from those working on the lever and the source of its tension while in the down position. Since the lever had never previously disengaged while in the down position, he had no prior notice of the defect complained of. The only defect about the lever which plaintiff noticed related to its inability to tighten the belt while in the upright position, and, as to this, he testified that, in his opinion at the time it was first discovered, it couldn't be remedied (Tr. 57).

It is also expected that defendant will take the position that plaintiff knew, or should have known, of the precise defect i.e.; improper assembly, which caused his injury. In support of this position, defendant will undoubtedly contend that the bolt which was inserted through the sleeve and baler chamber was approximately 3/4 inch longer than the bolt ordinarily required. Defendant might further contend that plaintiff's version of the manner in which the lever was assembled would not possibly allow it to work.

In answer to the first contention as to the excessive length

of the bolt which was used, necessitating the addition of several washers, plaintiff testified (Tr. 94) that this particular bolt was basically hidden from view by another lever on the side of the baler (see diagram and Exhibit "I") and that the operation of a hay baler caused considerable accumulations of dust and hay leaves on all exposed areas (Tr. 94). Furthermore, it is a matter of common knowledge that one who purchases a piece of new machinery can hardly be expected to know whether each precise part of the mechanism has been properly engineered, assembled and constructed.

On cross-examining plaintiff defendant attempted to show, by means of illustration with the parts before the court, that the lever could not be put into the upright position without the presence of a bushing. So that this Court will not be misled (Tr. 92) plaintiff wishes to point out that the illustration used in the lower court would not allow the lever to move into the upright position for two reasons: (1) Exhibit "D", which was used to represent the side of a baler, had a welded projection of about 1/8 inch which prevented the lever from sliding during the court demonstration (Tr. 109, 110), and (2) the manner of the demonstration caused the bolt to be cinched tightly against the baler.

If the Court will carefully examine Exhibit "E" (the bolt which plaintiff took from the lever assembly), it will notice that the burr was originally cinched against the end of the threads as tightly as possible. The groove is very pronounced. In fact, the burr was secured so tightly against the end of the threads that it caused the bolt to crystallize and break when removed. Consequently, with just enough washers to

allow the burr to secure the washers against the lever without inserting the required bushing—but yet not so tight as to cause a bind—the use of an undersized bolt and the absence of a bushing would still permit the lever to work, from all outward appearances, in much the same manner that it would have normally worked had it actually had the required bushing. If the Court further considers that the entire lever mechanism was subject to pulley-and-belt or spring tension, it can see that the lever would still operate without giving the operator of the baler actual notice that it was defective.

The defendant may place emphasis on the recent Utah case of Scoffield v. Sprouse-Reitz Co. (1953), 265 P2 396, which involved injuries to a salesman who fell over the side of a stairway having no bannister while calling on the manager of a defendant store. However, it is submitted that that case does not apply to the facts of this case for the reason that plaintiff there had "ample opportunity to observe and, as a reasonably prudent man, should have looked to locate the handrail before he attempted to put his weight on it." The case at bar is entirely different and more nearly fits the rule announced in the case of Glenn v. Gibbons and Reed Co.

There seems to be no question but what the issue of contributory negligence was clearly for the jury. An issue was presented which by all standards could not be resolved against plaintiff in view of the rule accepted in the Sprouse-Reitz Co. case that all reasonable inferences should be resolved in his favor.

The case of Heckel v. Ford Motor Co. (New Jersey) 138 Atl. 242, involved a situation wherein a rapidly turning

tractor pulley burst loose, striking plaintiff who was in the path of the flying parts. In pointing out that the case hinged on the issue of whether there was a defect in the pulley, the court said:

> "As before stated, it was for the jury to determine whether or not there was a defect in the pulley; whether or not the pulley did break or burst because of such defect; and whether the bursting so caused was the proximate cause of injury to the respondent."

The interesting part of that case lies in that no issue was raised that plaintiff was contributorily negligent or assumed any risk in getting in the path of the pulley parts. That plaintiff knew that the pulley was rotating rapidly under great centrifugal force and that if it disintegrated it would injure him. But he also knew that a piece of equipment properly manufactured and assembled does not break loose in such manner.

Quoting from 38 Am. Jur. Par. 188 at page 865, it is stated:

> " . . . a question of contributory negligence does not become one of law for the court to decide solely for the reason that there is no evidence directly to the effect that the plaintiff appreciated the peril. In other words, it is for the jury to determine whether knowledge of the physical characteristics of the offending instrumentality constituted a sufficient warning of peril to the plaintiff."

(C)

The uncontradicted evidence introduced in behalf of plaintiff did not prove, as a matter of law, that he assumed the particular risk from which his injuries occurred.

Prosser on Torts at page 376 outlines the elements of the defense of assumption of risk:

> "The defense of assumption of risk rests upon the plaintiff's consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of harm from a particular risk."

The discussion set forth in the preceding section relating to contributory negligence contains the essential arguments which plaintiff contends will remove him from the category of one who has assumed the risk of the defective baler assembly. Plaintiff has previously pointed out that he had no knowledge of the particular risk from which his injuries occurred; consequently, it is impossible to construe any consent on his part to accept the same.

Not only must plaintiff have had actual or constructive knowledge of the risk involved, but he must have voluntarily made the choice of encountering the risk notwithstanding the peril incident to it. There can be no choice unless the person is aware of the precise risk.

All of the cases are emphatic in stating that the risk must not only be known, but that the dangers arising from it must be appreciated. Plaintiff submits that had he known of the defects in the assembly of the lever, he would certainly have appreciated the danger involved and would have exercised his "freedom of choice" by repairing the lever, thereby eliminating the risk itself.

Plaintiff may refer to the case of Wold v. Ogden City (Utah, 1953), 258 P2 453. That case involved an action against Ogden City and a construction company for injuries

sustained when plaintiff fell into a ditch which had been dug in the street in front of his home. On appeal from a motion dismissing the action, this Supreme Court held that, under the circumstances of the case, plaintiff had been contributorily negligent and had assumed a known risk, and, therefore, was precluded as a matter of law from recovering against either defendant.

The Wold case is entirely dissimilar from the case at bar for the simple reason that the plaintiff in that case actually saw the hazard with his own eyes and "looked this situation over." Notwithstanding the dangers apparent to him, the plaintiff in that case attempted to cross a trench at 2:30 in the morning in an "extremely dark area, no lights, and in the middle of the night and in the shade of the trees." In its decision the Supreme Court quoted extensively from Prosser on Torts, quoting directly that "the plaintiff cannot be heard to say that he did not comprehend a risk which must have been obvious to him." The court further acquiesced with Dean Prosser that in the usual case, the plaintiff's "knowledge and appreciation of the danger will be a question for the jury; but where it is clear that any person of normal intelligence in his position must have understood the danger, the issue must be decided by the court."

It was further pointed out in the Wold case that plaintiff had an easy alternate route to follow which would not have submitted him to the dangers of a trench cave-in in the middle of the night. Plaintiff believes the facts of the Wold case have no similarity to the case before this Court, although the law set forth therein is sound.

CONCLUSION

Plaintiff submits that none of the defenses raised by defendant in its motion for dismissal and for directed verdict, viewed in light of the evidence, justified the lower court in taking the case from the jury as it did. The evidence supporting causation and negligence on the part of defendant is strong and, as to the defenses of contributory negligence and assumption of risk, it can easily be seen that the defendant did not know, and reasonably could not have been expected to know, of the particular hazard and risk which caused his injury. Unless plaintiff can be charged with having such knowledge, the case should have gone to the jury.

Plaintiff requests that this Court reverse the ruling of the District Court of the Second Judicial District in granting defendant's motion for dismissal and for directed verdict and in denying plaintiff's motion for new trial.

Respectfully submitted,

GLEN E. FULLER and
JOSEPH Y. LARSEN, JR.
Attorneys for Plaintiff-Appellant
32 Exchange Place
Salt Lake City, Utah